No. 3995

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY S. FLEMING,
Appellant,

vs.

MONTANA COAL & IRON COMPANY,
Appellee.

BRIEF FOR APPELLANT.

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MC KEE PTG. CO., BUTTE

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STATEMENT OF THE CASE.

This case is here on appeal from the United States District Court for the District of Montana, taken by Henry S. Fleming, plaintiff below, appellant here, to reverse an interlocutory order and decree made and rendered against him in favor of Montana Coal & Iron Company, defendant below, appellee here, refusing an injunction pendente lite, because of certain errors set forth in the assignment of errors.

The suit was brought by Henry S. Fleming vs. Montana Coal & Iron Company, to enjoin using the funds of the corporation in the purchase of outstanding bonds issued under the indenture of trust, and mortgage, made and executed by the defendant company to Empire Trust Company, under date of January 2, 1912, except according to the terms, conditions and provisions set forth and contained in said mortgage, together with other relief and asking for an interlocutory injunction during the pendency of the suit in accordance with the said prayer of the complaint.

The complaint duly verified by Henry S. Fleming was filed on the 28th day of November, 1922. On the 27th day of December, 1922, notice of motion for an injunction pendente lite in accordance with the prayer of the complaint was duly filed.

On the 26th day of December, 1922, counsel for the defendant acknowledged receipt of said notice of motion and duly notified counsel for plaintiff that defendant did not intend to resist the said application.

That on the 4th day of January, 1923, said motion for injunction pendente lite came on for hearing before the court pursuant to said notice and thereupon there was filed in said cause the letter of counsel for defendant, stating that the defendant did not resist said application. There was also filed in said cause at said hearing the affidavit of Henry S. Fleming. Said motion was then submitted to the court upon the bill of complaint, the affidavit of Henry S. Fleming and the letter of counsel for the defendant, and the matter taken under advisement by the court. That

thereafter on the 5th day of February, 1923, the court rendered its decision upon the said application and motion and then and there denied the same.

A bill of exceptions to the ruling of the court was duly prepared, served, signed, settled and allowed and filed in said suit; that thereafter and within thirty days from the entry of said order and decree the plaintiff on the 26th day of February, 1923, filed his petition for an appeal from said interlocutory order and decree, together with an assignment of errors and on the 26th day of February, 1923, the court by an order duly given and made on said day, allowed said appeal, approved the bond given in accordance with said order of court and thereupon citation was duly issued and served and the suit brought into this court pursuant thereto.

The facts which for the purpose of this hearing must be taken as true as set forth in the verified complaint and in the affidavit of Henry S. Fleming, established that Henry S. Fleming was at the time of the commencement of the suit and for a long time prior thereto had been the owner of certain bonds issued by the defendant corporation, which said bonds were secured by a certain mortgage made by defendant company, to the Empire Trust Company. The mortgage contained among other provisions the following:

> "In trust, nevertheless, for the equal pro rata benefit and security of all the holders of any of the above mentioned bonds and coupons at what period soever the same may be issued, without any preference or priority of one bond over an-

other, except as hereinafter mentioned, and for the uses and purposes, and on the conditions, covenants and restrictions herein declared and expressed."

The said mortgage further provided for the creation of a sinking fund, which was to be for the benefit and security of the bonds issued and to be issued. In the said mortgage, the creation of the sinking fund is provided for by directing that:

"Beginning with the second day of January, 1914, and thereafter, and until all the bonds issued and to be issued under this indenture are fully paid and canceled, an amount which for and during the period of three years ending January 2, 1917, shall equal the sum of two cents, and which thereafter for and during the period of ten years ending January 2, 1927, shall equal the sum of three cents, and which thereafter for and during the period of ten years ending January 2, 1937, shall equal the sum of four cents, and which thereafter and so long as any of the bonds hereby secured may be outstanding, shall equal the sum of five cents, in each instance for and in respect of each and every ton of two thousand two hundred and forty pounds of run of mine coal mined or taken during the preceding period of six months ending on each second day of January or July (as the case may be), from any of the property at the time of such mining or taking subject to this indenture or provided or agreed to be subject or subjected thereto, whether the property from which such coal is mined or taken is held in fee

or under lease by the Company or any subsidiary company or by others under leases or other instruments heretofore or hereafter executed by either of them or in any other manner and by whomsoever said coal may be mined or taken."

It is then provided that all payments into the sinking fund in said article provided for, shall be disposed of and applied solely as in said article of said indenture specified and provided.

It is then specified that said money and all moneys paid into or becoming a part of the sinking fund mentioned in said article shall by the trustee upon receipt thereof be applied in this manner: That whenever the money in the sinking fund shall amount to ten thousand ($10,000) dollars or more the trustee shall advertise for written proposals to sell to it bonds secured by said mortgage and then outstanding to the extent of the funds then in its hands available and shall purchase the bonds offered at the least price asked therefor; that if upon such advertisement no proposal to sell bonds shall be made, at or below the price named, that the money in the funds shall be applied to the redemption of bonds at the rate of 105 per centum of the principal thereof with all interest accrued and unpaid at the time fixed for such redemption and it is specified that in order to determine what bonds may be redeemed at said figure, the determination is to be made by lot in the manner specified in said mortgage.

There is another provision in the mortgage wherein it is provided for as follows:

"It is further covenanted, promised and agreed that at any time hereafter, and prior to the time when the principal sum secured by the said bonds shall become due, the Company may make a call for the redemption of the whole or any part of said issue of bonds then outstanding in the manner and with the effect hereinafter stated.

"The bonds to be redeemed under such call shall be determined by lot by placing pieces of paper of equal size and appearance and equal in number to the bonds outstanding, with numbers on them respectively corresponding to the numbers of the respective bonds outstanding, in a wheel or box, and after properly and thoroughly commingling the same, such pieces of paper shall be drawn out, one at a time, by a person appointed for that purpose by resolution of the Board of Trustees of the Company, until sufficient amount of the bonds represented thereby shall have been drawn to equal the amount at their par value of the bonds called for redemption, with accrued interest to date of call, plus the amount of premium required to be paid upon the same. The Company shall thereupon give notice by public advertisement in one newspaper published in the City of Billings, Montana, and one newspaper published in the City of New York, daily for one week, the last publication to be finished at least thirty days before the date fixed for said redemption, and any such advertisement shall state the number and par value of the bonds so drawn for redemption, and also that said bonds have under the provisions of the mortgage been determined by lot as bonds to be redeemed by the Company, at the time and place

mentioned in the said notice. Said notice so published shall further state that the said bonds are called for redemption at a place in the City of New York therein mentioned, at a date and hour therein mentioned, not less than thirty days nor more than two months from the date of the last publication, at which time and place said Company shall redeem said bonds by paying the principal and accrued interest due thereon to date of actual redemption, plus a five (5) per cent. premium on the amount of the par value of principal thereof."

By the terms of the mortgage, redemption is provided for prior to the maturity of the bonds in two specific provisions and two only.

First: Under the sinking fund provision.

Second: Under the call for the redemption of the whole or any portion of said bonds.

Under the sinking fund provision there must be an advertisement published, calling for the offer of bonds for sale to the Company at a price not to exceed 105 per centum of the principal. If no bonds are offered for sale to the Company under that advertisement then the amount of money available in the sinking fund is to be applied to the redemption of bonds selected by law at 105 per centum of the principal.

Under the provision for the redemption of bonds by the Company not required by the sinking fund provision a call for redemption of bonds determined by lot is provided for, thirty days' notice must be published

and the bonds selected by lot redeemed at 105 per centum of the principal.

The defendant Company entirely disregarded and violated both of the provisions of the mortgage above set forth in that it redeemed bonds prior to the maturity thereof, without in any manner attempting to conform to the requirements and provisions of the Deed and Mortgage, by buying bonds at any price for which they were offered and could be purchased and thereupon canceling the same contrary to the terms of the mortgage, using for this purpose the funds of the corporation. It is admitted that the Company has purchased bonds at a price below par to the extent of more than one hundred thirty-eight thousand ($138,000); that it threatens to continue so to do and to disregard and violate the terms and conditions of the mortgage to the irreparable injury and damage of the bondholders among whom the plaintiff is one.

ASSIGNMENT OF ERRORS.

I.

The court erred in refusing an injunction pendente lite in the above entitled cause made upon the application of the plaintiff.

II.

The court erred in holding and deciding that the methods of redemption of the bonds secured by the Trust Deed are not exclusive and that the plaintiff cannot complain because the defendant voluntarily purchased for redemption in open market or at private

sale bonds that the owners are willing to sell, and that the defendant has the right to purchase any bonds that it sees fit to purchase and this right is not affected by the Trust Deed or the terms thereof.

III.

The court erred in holding and deciding that the plaintiff has no grounds for complaint and that it is for the plaintiff's advantage that the surplus funds of the defendant Company be devoted to decrease the bond debt instead of to increase the dividends.

IV.

The court erred in holding and deciding that it is not material that the defendant does not and did not resist the Application for an Injunction and in effect consented thereto.

V.

The court erred in holding and deciding as follows, to wit:

> "Owning some defendant's bonds, plaintiff seeks to enjoin its purchase in open market of any the issue. It appears the bonds are secured by a trust deed which provided that defendant will maintain a sinking fund of two or five cents per ton of coal by it mined; that whenever this fund amounts to $10,000, the trustee (Empire Trust Co.) shall solicit and purchase such of the bonds offered at the lowest price but not to exceed 105; that if offers do not suffice to exhaust the fund to that end the trustee shall draw by lot, call and redeem bonds at 105; and that at any time defendant may draw by lot, call and redeem bonds at 105.

It further appears that defendant has been purchasing its bonds at par or less in open market, but it does not appear it had failed to perform its contract in respect to the sinking fund.

Plaintiff contends that the methods of redemption of the trust deed are exclusive, that therein he has a prospect of redemption of his bonds at 105 before maturity and that defendant's open market purchases defeat this prospect and impair his right. In so far as compulsory redemption prior to maturity is concerned, plaintiff is right; but this in no wise debars defendant from voluntary redemption, that is, from purchasing in open market or private sale any bonds that the owners are willing to sell. It is very clear that this right of purchase is not of the terms of and is unaffected by the trust deed—has not been bartered away.

Plaintiff has no ground for complaint. Indeed, it is to plaintiff's advantage that surplus funds are devoted to decrease the bond debt instead of to increase dividends.

For thus (apologies to Monsieur Coue) from day to day in every way his security is getting better and better. Nor is it material that defendant does not resist injunction, for injunction is an extraordinary remedy not to be made ordinary and so abused merely because unresisted."

ARGUMENT.

This is an appeal from an order made and entered in the United States District Court for the District of Montana, denying an application made by the plaintiff herein for an injunction *pendente lite*. The plaintiff, as a holder of certain bonds of the defendant company, seeks by his bill in equity, filed in this action, perpetually to restrain the defendant company from purchasing from individual bondholders and retiring bonds of the same issue otherwise than in the manner provided by the mortgage securing those bonds. The application for a temporary restraining order, although unopposed by the defendant was, nevertheless, denied by the court.

The facts upon which the plaintiff relies to entitle him to the relief prayed for are contained in his bill of complaint and in his affidavit filed in support of his application. Those facts are not disputed. In substance they are as follows: In 1912, the defendant company authorized and issued its first mortgage bonds to the par value of some $750,000, secured by an Indenture of Trust and Mortgage covering all of the lands owned by the company. This indenture made provision for the operation of a sinking fund to be created by the payment to the trustee of a certain sum per ton of coal mined, and further provided, that such sinking fund whenever it reached the sum of $10,000. should be used for the purpose of retiring the company's bonds. It is admitted that the defendant has complied with the terms of the sinking fund provisions. The Trust Mortgage, however, further

provided for the redemption by the company of any part or all of the bonds prior to their maturity date upon certain specified terms and conditions requiring, among other things, that the particular bonds to be redeemed under such clause, if less than the whole issue then outstanding, should be determined by lot and that the holder should receive for the bond when so redeemed a premium of five per cent (5%) of the par value. It is admitted that the company has purchased at private sale a very large number of the bonds issued under this mortgage and that such bonds have in turn been canceled and retired. The plaintiff contends that the retirement of bonds in this manner is not in accordance with the terms of the mortgage under which the bonds were issued. It is admitted that unless restrained the company proposes to make further purchases and retirements in similar manner and the plaintiff therefore seeks through this action and pending its final determination to restrain the company from making such further purchases for the purpose of retiring and canceling the bonds purchased.

POINT I.

IT IS UNDISPUTED THAT BONDS HAVE ACTUALLY BEEN RETIRED BY THE DEFENDANT OTHERWISE THAN ACCORDING TO THE PROVISIONS OF THE TRUST MORTGAGE.

The plaintiff does not contend that the mere purchase of its own bonds by a corporation necessarily

amounts to a retirement. It is quite conceivable that a corporation may invest its surplus funds in its own securities and either hold them for resale or reissue, and that which is not tantamount to a retirement since the outstanding obligation of the company under the trust mortgage is not altered, nor is one bondholder preferred over another. It is not disputed, however, that such are not the facts in the case at bar. Here the bonds were purchased and actually canceled and retired and the bonded indebtedness of the corporation reduced by that amount. It follows obviously, that the only question presented by the case is whether the corporation may retire its own bonds in a manner other than as provided in the Trust Deed under which those bonds are issued.

POINT II.

THE DEFENDANT COMPANY IS BOUND BY THE TERMS OF THE MORTGAGE UNDER WHICH THE BONDS ARE ISSUED TO RETIRE OR REDEEM BONDS PRIOR TO MATURITY ONLY IN THE MANNER EXPRESSLY PROVIDED IN THE MORTGAGE.

The mortgage and the bond owned by any holder unquestionably constitutes a contract obligation on the part of the defendant or issuing company. That contract, although in part made with a trustee, is made for and inures to the benefit of the individual bondholder. The defendant Company is bound by the terms of that contract and the holder of a bond is bound by its terms, while mortgage and bond together con-

tain all the terms of the contract and define distinctly and absolutely the rights and liabilities of the parties. *Low* v. *Blackford*, 87 *Fed.*, 392. The company has a right to insist, unless otherwise provided in the contract, that the holder make no demand for the payment of the principal of any bond until its maturity date and, on the other hand, any bondholder, unless it be otherwise provided in the mortgage or the bond, has the right to rely on the payment of the company's obligation exactly in accordance with its terms. While it may be and probably is true that any individual bondholder may waive any provision of the contract in his favor in so far as it affects him personally, that waiver will not be binding upon another bondholder against his wish. Thus, even if one bondholder is willing that his bond should be retired before maturity the effect of that retirement is felt by the other bondholders, since the funds used for the retirement of that bond might otherwise be used in the retirement of the bond of one of the other holders. In other words, the trust mortgage is so framed as to provide that if the company has funds available to the redemption of bonds every bondholder has an equal chance with every other that his particular bond shall be redeemed at the profit provided by the mortgage. Therefore, no one holder can by his action bind any other holder against the latter's wish to a waiver of the right to the chance that the latter's bond shall be the one to be redeemed. *Hackettstown National Bank* v. *D. G. Yuengling Brewing Co.*, 74 *Fed.*, 110. It is not for a moment contended that the company is

obliged to use any of its funds over the sinking fund requirements, in the redemption of the bonds. But that *if* so used it must be used in accordance with the contractual obligations of the parties. If any of the bonds, therefore, are to be retired before their maturity date, the right to advance the date of retirement must be accorded to the company by a particular and definite provision in the Trust Mortgage. .

The action of the company in retiring bonds acquired with its corporate funds accomplishes an obvious preference of the bonds so retired over those outstanding. Yet on page 20 of the Mortgage, it is distinctly provided that no such preference shall be given:

> "*Now, therefore, this indenture witnesseth,* That for the purpose of securing the due and punctual payment of the principal of said bonds to be issued, or which may, as herein mentioned, be issued, amounting in the aggregate to not more than seven hundred and fifty thousand dollars ($750,000.) and each and every one of said bonds, together with the interest thereon, without any preference or priority of any of said bonds above mentioned, or series of bonds, over any other, according to the true intent and meaning thereof, and in consideration of the recited premises. . . . . "

The company has given certain selected bondholders priority in a cash return on their bonds at a time when it was beneficial to those holders to secure that cash return. As the bonds in question bear interest

only at the rate of five per cent it was distinctly to the advantage of a holder to have his bonds purchased at a time when money commanded a far higher rate of interest. In failing with the corporate funds available to redeem bonds in accordance with the provisions of the mortgage the majority control of the defendant company deprived the bondholders generally, of knowledge of the proposed redemption of the bonds, as well as of the right, which inured to them by virtue of the terms of the mortgage, to have their bonds redeemed at that advantageous time. By such act the favored bonds were given a definite and decided preference and priority over the less favored bonds. That clearly violated the quoted provision of the mortgage given, to secure these bonds and the terms of which absolutely govern the parties. The sanctity of contract has ever been one of the cardinal principles of our law and bondholders acquire and hold their bonds in reliance on that principle as applied both to the bonds and the mortgage securing them. But sanctity of contract must be forgotten if a company is to be permitted thus wilfully to ignore the plain, clear provisions of its contract.

The mortgage given by the defendant company to secure the issue of bonds now in suit provides that the bonds shall be due and payable thirty (30) years from the date of the mortgage and also that there shall be "no priority of one bond over another." It further provides two methods, but only two, by which the maturity date of the bonds may be anticipated by the company. The first is through the operation of

the sinking fund, with which we are not presently concerned. The second is through a call for redemption at any time of all or any part of the issued and outstanding bonds. The provision for this method of payment is contained in paragraph 29 of the mortgage (page 42). That paragraph is set forth in full in the affidavit of Mr. Fleming, submitted on the application below. We quote here, however, certain particularly pertinent expressions from that paragraph:

> "It is further covenanted, promised and agreed that at any time hereafter and prior to the time when the principal sum secured by the said bonds shall become due, the company may make a call for the redemption of the whole or any part of said issue of bonds then outstanding in the manner and with the effect hereinafter stated. The bonds to be redeemed under such call shall be determined by lot * * *. Said company shall redeem said bonds by paying the principal and accrued interest due thereon to date of actual redemption, plus a five (5) per cent premium on the amount of the par value of principal thereof."

Other than the provisions governing the payment of the bonds at maturity, the sinking fund provision and the paragraph above quoted are the only methods provided in the mortgage, which in turn, determines the right of the parties in respect of the payment of the bonds. In other words, the contract between the parties stipulates that the bonds shall be either paid at maturity or prior thereto, by the operations of the sinking fund or under the provisions of paragraph 29

on page 42. The plaintiff claims that a retirement, if accomplished in any other manner than one of those two, constitutes a clear violation of the terms of the contract in that respect. It is the employment of corporate funds for the redemption of these obligations in a manner which the terms of the mortgage do not contemplate. Such a violation deprives the plaintiff of a substantial right, for as much as it deprives him of an opportunity to have one or more of his bonds redeemed at a premium through their selection by lot in the manner provided by the paragraph quoted.

The rights of bondholders are fixed by the terms of the mortgage and those terms cannot be altered without the consent of the bondholders. In *Vose* v. *Bronson*, 73 *U. S.*, 452, 18:846 it is said: "No prudent man would ever buy a bond in the market if the provisions made for its ultimate redemption could be altered without his consent."

It is not necessary to call the court's attention to the fact that corporate securities are purchased for investment on the strength of their maturity and redemption provisions. The possibility of the payment of a premium in the event of a call for the redemption of a part or all of the issue and thus the earlier release at a profit of the money invested in that security is one of the features of the bond for which the purchase price is paid. The issuing company should not be permitted to connive to avoid the payment of that premium, or in effect, itself to select certain bonds for redemption to the exclusion of others. To permit that feature of the bond to be wilfully abrogated by

the company through the purchase at private sale and retirement of some of its bonds is to deprive the holder of a right which was a part of the consideration paid by him for the bond. The invasion of that right is an injury. It represents a definite loss to the bondholder through the substitution of a new contract for that originally entered into. In the case of *Lisman* v. *Michigan, etc. Co.*, 50 *N. Y., A. D.* 311, the court holds that that construction of the mortgage was to be adopted which was most favorable to the bondholders and which would not impair their security in any way. "Bondholders have the right to insist that the defendant shall carry out his contract; that it shall pay its bonds when it agreed to, not before, and that in the meantime the interest shall be paid at the time stipulated." We quote also from the opinion in that case: "When all of the provisions of the mortgage are thus read and construed together, it is clear that it was never intended to give to the mortgagor the right by its own act to pay the principal of the bonds in advance of the time specified in them when the same would mature. Any other construction would not only be unreasonable and unfair to the bondholders, but contrary to the express provisions of the mortgage." The principle is the same whether the company attempts to force the bondholder to surrender his bond before it becomes due or whether, as in this case, the bondholder seeks to prevent the company from preferring one bond over another. The contract would lack mutuality unless that were true.

It is well settled that payment of an indebtedness

secured by a mortgage cannot be enforced prior to the time fixed for the payment thereof. Neither the one party nor the other can make a new contract except by mutual consent and the court will not at the instance of either substitute a new contract for that originally entered into. The rule applies not only to the individual bond and mortgage, but to the great issues of corporate securities made for the ultimate benefit of a large number of individuals and surrounded and safeguarded in every direction. See Jones on Mortgages, Vol. 2, Sec. 1052; *Abbe* v. *Goodwin*, 7 *Conn.*, 377; *Chicago, etc. Co.* v. *Pyne*, 30 *Fed.*, 86, *at page* 90.

On the other hand, a corporation cannot compel a bondholder to accept payment of his bond before maturity against his objection unless such payment is made in accordance with a particular provision of the bond and mortgage. See *Missouri, Kansas and Texas Railway Co.* v. *Union Trust Co.*, 156 *N. Y.*, 592, 51 *N. E.*, 309; *Harnickell* v. *Omaha Water Co.*, 146 *N. Y. App. Div.*, 693, affirmed, 208 *N. Y.*, 520; *Lisman* v. *Michigan, etc. Co.*, 50 *N. Y. App. Div.*, 311.

As a corporation cannot compel a bondholder to accept payment before maturity other than in accordance with the provisions of the contract agreement, certainly a bondholder can insist that the company redeem a part of its bonds only in that method which is recognized under the contract.

In the *Harnickell* case, cited above, the court says, at page 701: "The bondholders have a right to insist that the defendant shall carry out its contract; that it

shall pay its bonds when it agreed to, and not before, and that in the meantime the interest shall be paid at the times stipulated."

The words of paragraph 29 of the mortgage quoted above read in connection with the words of the bond, the form of which is incorporated in the mortgage, are to be construed as mandatory upon the company if bonds are to be redeemed before maturity. The provision of the mortgage is that "at any time * * * the company may make a call" and that the bonds to be redeemed "shall be determined by lot" and the company "shall" pay, etc.; the bond states that it is *"entitled to redemption"* in accordance with the terms of the Trust Mortgage. As the bonds derive their being from and are entirely subject to the terms of the mortgage securing them it is obvious that this clause gives the company a specific right to which it was not otherwise entitled. At the same time the mortgage provides that the holder of a bond is "entitled" to the benefit of that provision and the rights of the bondholder in that respect cannot be disregarded. Therefore, the mortgage by that provision excludes any other method (except the sinking fund) of redeeming the bonds prior to maturity. The effect of the provision is permissive in so far as it gives the company a right to redeem before maturity, but it is distinctly mandatory and exclusive in stating the method by which that redemption shall be made.

It is, we submit, obvious that the corporation could not make a call for the redemption of a part or all of its issue of the bonds at par and accrued interest rather than at the redemption price of 105. The bonds

were issued by the company upon the distinct condition that except as they might be retired under the sinking fund provisions they should all remain outstanding until their maturity unless a premium was paid for an earlier redemption. The bondholder has the right to have the funds of the corporation used for the purpose of redemption at a premium if any redemption is to be made. The company is, therefore, doing by indirection that which it is obviously unable to do directly. In doing so, it is invading the rights of this plaintiff to his irreparable damage. The loss of his rights are absolute as soon as the money is expended by the company and those rights cannot be recalled or restored to him. That the company intends further redemption in like manner in the future is not questioned and the plaintiff will suffer further irreparable injury and the repeated breaches of the company's contract should have been restrained by the District Court.

POINT III.

THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THE PLAINTIFF'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER BE GRANTED.

Respectfully submitted,

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